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Before The
Federal Communications Commission
Washington D.C. 20554

MAY 30 1997

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Implementation of Section 25)
of the Cable Television Consumer)
Protection and Competition)
Act of 1992)
)
Direct Broadcast Satellite)
Public Service Obligations)

MM Docket No. 93-25

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To: The Commission

REPLY COMMENTS

Hispanic Information and Telecommunications Network, Inc., ("HITN"), by its counsel, hereby submits its Reply Comments with respect to the above-referenced proceeding.¹ Specifically, HITN reiterates its comments with respect to that portion of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 which relates to carriage obligations for non-commercial, educational and informational programming. *Inter alia*, HITN urges again that the definition of "National Educational Programming Supplier" be extended to include those entities who conform with the eligibility criteria established by the rules for the Instructional Television Fixed Service ("ITFS"). These criteria conform with both the plain meaning and the statutory construction of the language used by Congress in Section 25 of the Cable Television Consumer Protection and Competition Act of 1992.

¹ HITN filed Comments in this proceeding on May 24, 1993. See *Notice of Proposed Rulemaking*, 8 FCC Rcd 1589 (1993) ("NPRM"). Consequently, HITN has previously established itself as a party to this proceeding, and the filing of Reply Comments is proper as well as timely.

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Furthermore, HITN supports the Denver Area Educational Telecommunications Consortium, et al. ("DAETA"), who oppose many of the suggestions and interpretations of the DBS industry licensees and companies who submitted comments in this proceeding. Predictably, the industry commenters favor the most limited interpretation of Section 25 when it comes to the use of the spectrum by any party other than the DBS licensees, and the most expansive interpretation possible regarding other parties' payment for the use of DBS licensees' spectrum. These positions, as detailed in HITN's comments submitted four years ago and the DAETA reply comments, are indefensible. In support whereof, the following is submitted.

I. Background

A. Introduction

On September 14, 1992, the Congress passed the Cable Television Consumer Protection and Competition Act of 1992 ("The Cable Act"). The Cable Act encompassed many areas of the cable regulation. Section 25 of the Cable Act amended the Communications Act of 1934, as amended, to add Section 335, entitled "Direct Broadcast Satellite Service Obligations." The key provisions of this new Section 335 as they affect the instant proceeding stated that the Commission must require as a condition of any authorization for a provider of direct broadcast satellite ("DBS") service that it reserve a portion of its channel capacity, from 4 to 7 percent, exclusively for noncommercial programming of an educational or informational nature. Furthermore, a provider of DBS

service must make channel capacity available to national educational programming suppliers, upon reasonable prices, terms and conditions.²

B. HITN's Educational Qualifications and Mission

HITN is a publicly-funded nonprofit organization whose purpose is to provide Spanish-language educational programming to cities around the country. HITN has received more than 40 Instructional Television Fixed Service ("ITFS") licenses from the FCC to serve markets, most with substantial populations, nationwide with its educational, Spanish-language programming. HITN would benefit greatly from having access to the DBS system under the program established by Congress in Section 335, as would its mostly Hispanic audience across the country. HITN believes that it provides exactly the type of service the United States Congress sought to ensure would be delivered to DBS audiences, and that HITN is unquestionably qualified to participate in the DBS channel set-aside for noncommercial programmers established by Congress in Section 335. Consequently, it propose that the Commission adopt the following principles in its rules governing the set-aside channels for the equitable and orderly administration of access to, and utilization of, those channels.

C. Summary of Comments

1. Fundamental Principle

In its Comments, HITN urged that the Commission use a general

² Section 25 has been found to be constitutional. See *Time Warner Co., L.P. v. FCC*, 93 F. 3rd 957 (D.C.Cir. 1996); petition for rehearing pending.

principle of fairness to guide its decision with respect to the specific rules adopted for the DBS channel set-aside for noncommercial programmers. The Commission was urged to provide as much access to the DBS service for noncommercial programmers as possible, rather than protecting the commercial interests involved in this proceeding.

2. Eligibility Requirements

The basic issue with respect to the carriage obligations for noncommercial educational and informational programming is establishment of the eligibility requirements for the use of the DBS set-aside channels as mandated by Congress. HITN suggested that the answer was self-evident, and that ITFS entities qualify under any interpretation of the definition.³

Clearly, HITN and all other ITFS licensees must be classified as "noncommercial telecommunications entities" since they are nonprofit private corporations organized primarily for the purpose of disseminating noncommercial educational and cultural programs to the public by means other than a primary television or radio broadcast station. To hold otherwise is to ignore the plain meaning of the language in Section 397.

3. Definition of Term "National"

The Commission in Paragraph 43 of the NPRM asked for specific comments with respect to the definition of the term "national" in

³ HITN suggested that both the plain meaning of the statute and statutory construction of the language used by Congress in the legislation determined the eligibility of entities to use this proposed service.

"national educational programming supplier". HITN urged that, to qualify as a "national" programming supplier, an entity would have to demonstrate that it is authorized by the FCC, or through some other legal means such as a contractual obligation, to provide programming to viewers in different areas of the country. Entities such as HITN, who are authorized to serve markets all across the country, and indeed provide Spanish language educational programming to students around the country, would thus qualify.

4. Channel Capacity

The Commission tried to confuse what is a very simple issue in this regard. First, the Commission asks for comments defining the term "channel". HITN urged that the Commission use the most expansive definition possible, in order to account for compression technology.

With respect to channel capacity, HITN commented that the Commission should use whichever methods produce the larger number of channels. To fail to do so would result in DBS providers using the Commission's standards to provide the least amount of channels possible and to avoid its public interest obligations to provide as much educational programming to the public as possible.

5. The 7% Solution

HITN stated that all DBS systems must be subjected to the same reservation requirement, i.e., the maximum percentage of 7%, with the channels available rounded up to the next full integer to meet or exceed the required percentage.

6. Costs

HITN urged that a central focus of the Commission's rules should be that rates should be kept as low as possible. Consequently, the definition of "direct costs" should be limited to those costs of transmitting the signal to the uplink facility and the direct cost of uplinking the signal to the satellite. No indirect costs of any kind should be permitted to be included in the determination of the rates by the DBS provider.

7. Definition of Educational Programming

HITN urged that the Commission should define educational programming, and apply the definition it has already established for educational programming in the ITFS service, specifically in Section 74.931 of the Commission's rules.

II. HITN Supports the Comments of Denver Area Educational Telecommunications Consortium,

HITN supports the position taken by DAETA on several key issues which HITN addressed in its comments. First, as noted by DAETA, the DBS industry has, to a great extent, not moved its position in the four years since this proceeding began. As noted in HITN's Comments, the FCC appeared also to favor the DBS industry in its approach to the proposed rules in this proceeding. The FCC was urged not to favor the entrenched interests then, and it should not now. There is one reason than ever for the FCC to adopt an expansive philosophy when adopting the rules contemplated herein. Educational; entities are in need of more, not less, assistance in delivering much-needed programming to its students, both at schools and in the home. In the four years since this proceeding began, distance learning has become an integral part of the fabric of this

country. The Commission cannot restrict the advantages which DBS technology can offer to the millions of students needing distance learning at this late date, simply because it may infinitesimally lower the profit margins of billion-dollar companies.

HITN concurs with DAETA that the DBS industry must take on added public interest responsibilities. DBS will have more channels than it can possibly use commercially. It must use its channel abundance to increase its public interest potential as a result. Adding public service obligations cannot possibly hinder the growth of the industry at this stage and in the future, as DAETA illustrates.

HITN concurs fully with DAETA that Section 25(b) prohibits any editorial content control by a DBS provider. This means that a DBS provider which has any input over whether a particular program or programmer gains access to Section 25(b) capacity is exercising editorial control. this cannot be condoned.

HITN concurs with DAETA that the DBS proposal of a programming "clearinghouse" to screen eligible programming, which is controlled by the DBS providers, is an idea which has no merit, for the same reason as just outlined.

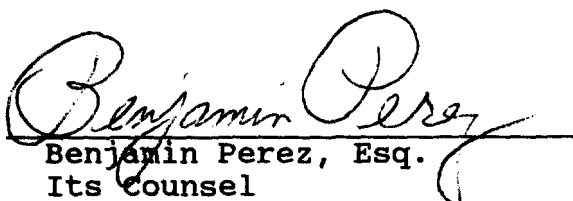
Finally, HITN's position in its Comments and DAETA's position in its Reply Comments with respect to the definition of direct costs must be adopted by the Commission. Any definition of costs must be forward-looking, and not include any costs which have been expended to date to construct the DBS systems. This approach has been adopted by the Commission with respect to telephone access

charges, and this approach should be utilized in this case. If the Commission allows direct costs to include cost for research and construction, then the rates will be so high that no educational, noncommercial entity will be able to afford to pay for such service.

WHEREFORE, the foregoing premises considered, HITN respectfully requests that Commission incorporate the comments of HITN and the reply comments of HITN and the Denver Area Educational Telecommunications Consortium, et al. into the regulations formulated to govern the use of the channels set aside for use by national educational programming suppliers in the DBS service.

Respectfully Submitted,

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